

1 HONORABLE RICHARD A. JONES
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10 UNITED STATES DISTRICT COURT
11 WESTERN DISTRICT OF WASHINGTON
12 AT SEATTLE
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15 BAYLEY CONSTRUCTION,
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17 Plaintiff,
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19 v.
20
21 AMERICAN GUARANTEE AND
22 LIABILITY INSURANCE COMPANY, et
23 al.,
24
25 Defendants.
26

27 CASE NO. C09-166RAJ
28 ORDER

16 **I. INTRODUCTION**

17 This matter comes before the court on Defendants' motions for summary
18 judgment (Dkt. ## 77, 78, 79). The court has considered the parties' briefing and
19 supporting evidence, and heard from counsel at oral argument. For the reasons explained
20 below, the court GRANTS two of the motions (Dkt. ## 77, 78) and DENIES one motion
21 (Dkt. # 79) as moot.

22 **II. BACKGROUND**

23 This lawsuit arises from the Plaintiff's claim for, *inter alia*, insurance coverage
24 from the Defendants,¹ as a result of a lawsuit filed against the Plaintiff in Oregon state
25

26 ¹ The Defendant insurers fall into four groups: American Guarantee and Liability Insurance
27 Company ("American Guarantee"); Travelers Property Casualty Company of America, St. Paul
28 Mercury Insurance Company, and St. Paul Fire and Marine Insurance Company (collectively
ORDER – 1

1 court. The Oregon lawsuit involved the construction of Gresham Station Shopping
 2 Center, and the project was substantially completed during 2000-01. The shopping center
 3 sued the Plaintiff in this case (Bayley Construction (“Bayley”), the shopping center’s
 4 general contractor), alleging claims of negligence and nuisance based on construction
 5 defects that allegedly resulted in water intrusion and property damage. *See Skinner Decl.*
 6 (Dkt. # 81), Ex. A (complaint in Oregon lawsuit).

7 The Oregon lawsuit was settled, and some of Bayley’s insurers paid the settlement
 8 fund: Travelers contributed \$ 1 million, Wausau contributed \$1 million, and American
 9 Guarantee contributed \$ 4 million. After that settlement, the Plaintiff dismissed its
 10 claims for a defense against Travelers and Wausau, and assigned to American Guarantee,
 11 Travelers, and Wausau its non-dismissed claims for indemnity, each against each other.
 12 *See* Def.’s Am. Cross-Cl. (Dkt. # 20) ¶¶ 13-14.

13 American Guarantee has not released or settled its cross-claims against the other
 14 insurers — namely National Union and Travelers — and those cross-claims are the
 15 subject of this lawsuit. *See* Def.’s Am. Cross-Cl. (Dkt. # 20) ¶ 16.

16 National Union and Travelers now move for summary judgment against American
 17 Guarantee’s cross-claims against them. American Guarantee also moved for partial
 18 summary judgment to bar Travelers from making a particular argument in defense against
 19 American Guarantee’s cross-claims.

20 III. ANALYSIS

21 A. Legal Standards.

22 Summary judgment is appropriate if there is no genuine issue of material fact and
 23 the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The
 24 moving party bears the initial burden of demonstrating the absence of a genuine issue of
 25 material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving

26
 27 “Travelers”); National Union Fire Insurance Company of Pittsburgh (“National Union”); and
 Wausau Business Insurance Company (“Wausau”).

1 party meets that initial burden, the opposing party must then set forth specific facts
 2 showing that there is a genuine issue of fact for trial in order to defeat the motion.

3 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

4 When a court is asked to determine whether an insurance policy covers a
 5 particular loss, the court engages in a two-step analysis. *See McDonald v. State Farm*
 6 *Fire & Cas. Co.*, 119 Wn.2d 724, 731 (1992). First, the court must determine whether
 7 the type of loss that occurred triggers coverage under the policy. *Id.* The insured bears
 8 the burden of proof as to this inquiry. *Id.* Where the insurance policy states that it covers
 9 only losses that “occur” during the policy period, the timing of an occurrence “is
 10 determined by when damages or injuries take place.” *Transcontinental Ins. Co. v.*
 11 *Washington Pub. Utils. Dists.’ Sys.*, 111 Wn.2d 452, 465 (1988). In situations where
 12 damage occurs over time, the court considers a policy’s definition of “occurrence” or
 13 other coverage-triggering language to determine whether or to what degree the loss is
 14 covered. *See, e.g., Gruol Constr. Co., Inc. v. Insurance Co. of N. Am.*, 11 Wn. App. 632,
 15 635-36 (1974).

16 If the insured shows that its loss was covered by the insurer’s policy, then the
 17 court turns to the second step: whether the policy has any applicable exclusions or
 18 limitations that would prohibit coverage. *McDonald*, 119 Wn.2d at 731. The insurer has
 19 the burden to show that an exclusion or limitation applies. *Id.*

20 **B. National Union is Entitled to Judgment as a Matter of Law Because the**
National Union Policies Treat Continuing Damage as One Occurrence that
Happens on the Date the Damage First Commenced.²

22 It is undisputed that the National Union policies issued to Bayley (the first of
 23 which became effective on December 31, 2004) state that National Union

25 ² This is one argument presented by National Union in its motion for summary judgment.
 26 Though its motion presents multiple alternative arguments, this order focuses on National
 27 Union’s argument related to the scope of coverage. Because the court finds that the National
 Union policies are not triggered due to their definitions of “continuing damage” and
 “occurrence,” the court need not consider National Union’s alternative arguments.

1 will pay on behalf of the **Insured** those sums in excess of the **Retained**
 2 **Limit** that the **Insured** becomes legally obligated to pay by reason of
 3 liability imposed by law or assumed by the Insured under an **Insured**
 4 **Contract** because of **Bodily Injury, Property Damage, Personal Injury**
 5 or **Advertising Injury** that takes place during the **Policy Period** and is
 6 caused by an **Occurrence** happening anywhere in the world.

7 Skinner Decl. (Dkt. # 81), Ex. E. The policies also define “Occurrence” to mean
 8

9 an accident, including continuous or repeated exposure to conditions, which
 10 results in **Bodily Injury** or **Property Damage** neither expected nor
 11 intended from the standpoint of the Insured. All such exposure to
 12 substantially the same general conditions shall be considered as arising out
 13 of one **Occurrence**.

14 In the event of continuing or progressive **Bodily Injury** or **Property**
 15 **Damage** over any length of time, such **Bodily Injury** or **Property Damage**
 16 shall be deemed to be one **Occurrence** and shall be deemed to occur only
 17 when such **Bodily Injury** or **Property Damage** first commenced.

18 Skinner Decl. (Dkt. # 81), Ex. E (adding the Endorsement No. 10 language to the original
 19 definition of “occurrence”).

20 According to National Union, these definitions establish that a claim “involving
 21 property damage will be treated as one ‘occurrence’ dating to the time the ‘property
 22 damage’ first commenced.” Def.’s Reply (Dkt. # 106) at 5. Because, National Union
 23 argues, it is undisputed that the water damage incepted during the 2000-01 period —
 24 before the National Union policies were in effect — all subsequent damage should be
 25 attributed to the date of the original occurrence per National Union’s definition of
 26 “occurrence,” and therefore the damage “occurred” outside the policy period.

27 In opposition, American Guarantee argues that it has limited its claims against
 28 National Union to only the damage that first occurred after the commencement of
 National Union’s policies. To support this argument, American Guarantee relies on the
 report of its expert Jim Perrault, who identified certain property damage that did not
 occur until 2006, 2007, or 2008. *See* Perrault Decl. (Dkt. # 92), Ex. B (hereinafter “the
 Perrault Report”) at 6-9. The Perrault Report also confirms that the shopping center was
 substantially completed before 2003. *See* Perrault Report at 4-5. According to American

1 Guarantee, because Mr. Perrault has opined that some property damage incepted during
 2 the National Union policy period, there is at least an issue of fact as to whether National
 3 Union's policies are triggered.

4 National Union's argument in rebuttal on this issue relies primarily on a recent
 5 Washington State Court of Appeals opinion regarding the timing of an "occurrence" of
 6 water-intrusion property damage, *Certain Underwriters at Lloyds v. Valiant Ins. Co.*, 155
 7 Wn. App. 469 (2010). In *Valiant*, the policy at issue defined "occurrence" to mean an
 8 "accident, including continuous and repeated exposure to substantially the same general
 9 harmful conditions." 155 Wn. App. at 474. The property damage at issue in *Valiant* was
 10 "extensive water intrusion damage resulting from a variety of construction effects in the
 11 building envelope." 155 Wn. App. at 472. The *Valiant* court held that, even assuming
 12 that there was more than one cause of water damage, an "occurrence" can be a
 13 "continuing condition or process; it need not be a single, isolated event," and because a
 14 construction defect in that case led to "continuous and repeated exposure . . . to harmful
 15 moisture that gradually intruded through the building envelope over a five year period
 16 from different sources," that water-intrusion damage constituted one "occurrence." 155
 17 Wn. App. at 474.³

18 The court finds that the facts of *Valiant* are analogous to the facts of this case.
 19 When, at oral argument, the court asked American Guarantee why *Valiant* does not
 20 support National Union's motion, counsel suggested that *Valiant* is relevant to defining
 21 an "occurrence," but National Union's policy is not "occurrence"-based but instead refers
 22 only to "property damage." Because American Guarantee has presented some evidence
 23

24 ³ The *Valiant* court analyzed the policy language in the context of "anti-stacking" language, and
 25 declined to consider an alternative argument regarding whether the loss was not covered due to
 26 "an endorsement excluding coverage for continuous damage that first occurs before the effective
 27 date of the policy." *Valiant*, 155 Wn. App. at 476. National Union's argument considered in this
 28 section is analogous to the alternative argument not considered by the *Valiant* court, but this
 28 court nonetheless finds *Valiant*'s construction of the "occurrence" definition to be instructive
 here.

1 that “property damage” occurred during the National Union policy period, it argues that
 2 summary judgment would be inappropriate.

3 But American Guarantee’s argument with regard to “occurrence” mischaracterizes
 4 the National Union policy, given that it *does* use and define the term “occurrence” with
 5 regard to coverage: only property damage caused by an “occurrence” during the policy
 6 period is covered. *See Skinner Decl.* (Dkt. # 81), Ex. E. Furthermore, Endorsement No.
 7 10 makes clear that if property damage is continuous, it is considered to be one
 8 “occurrence” at the time it first occurs.

9 Assuming that the Perrault Report accurately describes the property damage at the
 10 Gresham Station Shopping Center — an assumption challenged by National Union (see
 11 Def.’s Reply (Dkt. # 106) at 8 n.2) — even Mr. Perrault agrees that the water intrusion
 12 started before 2004. *See Perrault Report* at 5. The fact that the damage was ongoing and
 13 continued into the National Union policy period does not change the fact that it started
 14 before the National Union policy period. Because the National Union policy specifies
 15 that ongoing and continues property damage is considered to be one “occurrence” on the
 16 date of its first inception, and the first inception of the water intrusion here was before
 17 2004, the “occurrence” of property damage caused by water intrusion took place before
 18 the earliest National Union policy period. Thus, no National Union policy covers the
 19 Bayley loss.

20 **C. Travelers is Entitled to Judgment as a Matter of Law Because Travelers’
 21 2001-2005 Policies Expressly Exclude Property Damage Covered by Other
 Travelers’ Policies.⁴**

22 Travelers paid the \$1 million policy limits on Bayley’s 2000-01 policy into the
 23 settlement fund, but American Guarantee asserts that additional coverage under other
 24 Travelers’ policies — for policy periods 2001-02, 2002-03, 2003-04, and 2004-05 —

25
 26 ⁴ American Guarantee moved to strike portions of National Union’s and Travelers’ reply briefs
 27 and some of the supporting evidence submitted, but none of the disputed portions were relied
 upon in resolving either motion. Thus, the motions to strike are denied as moot.

1 should also be triggered.⁵ According to Travelers, “anti-stacking” language in those
 2 policies precludes coverage because Travelers paid out on the 2000-01 policy.

3 The 2001-02 and 2002-03 policies include the following language:

4 We’ll pay amounts any protected person is legally required to pay as
 damages for covered bodily injury or property damage that:

- 5 -happens while this agreement is in effect;
- 6 -is caused by an event; and
- 7 -is not property damage covered by another insurance policy issued
 to you by us or any of our affiliated insurance companies, unless
 such policy was purchased specifically to apply in excess of the
 limits of coverage that apply under this agreement.

8 Ciechanowski Decl. (Dkt. # 80), Ex. 8. The 2003-04 and 2004-05 policies include this
 9 language:

10 We’ll pay amounts any protected person is legally required to pay as
 damages for covered bodily injury or property damage that:

- 11 -happens while this agreement is in effect;
- 12 -is caused by an event; and
- 13 -is not covered by any liability insurance policy that was issued to
 you by us, or any of our affiliated insurance companies, at any time
 prior to this agreement.

14 Ciechanowski Decl. (Dkt. # 80), Ex. 9. In all the relevant policy periods, the policies also
 15 state that in cases of continuing property damage, Travelers considers that type of
 16 damage to “happen at the time that it is first manifested,” and “first manifested” means
 17 “first known, or first in a condition where it reasonably should have been known.”

18 Ciechanowski Decl. (Dkt. # 80), Exs. 8 & 9. Thus, according to Travelers, because the
 19 property damage at Gresham Station first manifested during the 2000-01 policy period
 20 and Travelers paid out on that policy, the property damage “happened” during the 2000-
 21 01 policy period (so any continuing damage during later policy periods is still attributed
 22 to the first manifestation during 2000-01) and the “anti-stacking” language in the policies
 23 preclude coverage under subsequent Travelers’ policies because Travelers paid out on the
 24 2000-01 policy.

25
 26
 27 ⁵ The parties agree that the 2005-06 Travelers policy is not triggered. See Defs.’ Reply (Dkt. #
 102) at 7 n.13 and Defs.’ Opp’n (Dkt. # 88) at 22:5-6.

1 American Guarantee argues in opposition that (1) there is a question of fact
2 regarding the first manifestation of the property damage at Gresham Station, because
3 American Guarantee's expert opined that some property damage incepted each year
4 between 2002 and 2006, and (2) Travelers' "first manifestation" policy language is
5 ambiguous and therefore unenforceable. The court will address American Guarantee's
6 arguments in turn.

7 **1. The Damage at Gresham Station was Continuing Damage Constituting
8 One "Event."**

9 American Guarantee argues that because its expert has opined that that "new
10 property damage began at Gresham Station each year between 2002 and 2006," that
11 property damage is not "continuing damage" and thus first manifested each year between
12 2002 and 2006, taking that property damage outside the scope of the "anti-stacking"
13 provision.

14 To rebut that argument, Travelers points to various places in the record where
15 American Guarantee's experts or designees have testified that the damage in this case is
16 continuous. For example, American Guarantee's expert Jim Perrault testified in a
17 deposition as follows:

18 Q So all of the conditions identified by you as defective
19 conditions in this case all relate to the lack of and/or improper use of
20 sealants, transitions, flashings, or other systems to preclude water from
21 getting into the building?

22 A Yeah. It would be related to improper detailing including
23 sealants, flashings, et cetera.

24 Q Would you agree with me that all of the damage that is
25 identified in this case all results from the same or similar lack of detail, lack
26 of flashings, lack of transitions, lack of means to keep water out of the
27 building?

28 A I believe that's correct.

 Q So all of the damage results from substantially the same type
 of construction defect?

 A Yeah. Essentially.

1 Smith Decl. (Dkt. # 83), Ex. J at 173:22-174:12. American Guarantee's Rule 30(b)(6)
2 designee clarified American Guarantee's position as to the number of "occurrences" of
3 property damage:

4 Q Is [American Guarantee] alleging or taking the position in this
5 case as to [Travelers] that this claim involves multiple occurrences as
opposed to a single occurrence?

6 A We are not taking the position that it's multiple occurrences.

7 Smith Decl. (Dkt. # 83), Ex. I at 178:18-23. The designee further testified regarding the
8 continuous nature of the property damage at Gresham Station, in response to a question
9 from National Union's attorney:

10 Q I know [Travelers' attorney] chased you around a lot on this
11 point. I want to approach it from a slightly different viewpoint, and that is
this issue of continuous property damage out at this property. You
12 indicated there are various categories of property damage, and I don't
expect you to go through all of those. Can you identify any property
damage at the Gresham Station that was not continuous in nature?

13 A Not that I can think of right now.

14 Smith Decl. (Dkt. # 83), Ex. I at 247:24-248:7.

15 Thus, it becomes irrelevant whether Mr. Perrault can attribute some property
16 damage to specific years between 2002 and 2006, because it is undisputed that the
17 property damage at Gresham Station was continuous and constitutes one occurrence.
18 Because Travelers paid out on the policy covering the time period when the building was
19 completed, and the subsequent damage was a continuation of that damage, Travelers'
20 "anti-stacking" language precludes coverage under *Valiant*.

21 As in *Valiant*, Travelers' policies limit recovery to one policy limit per "event"
22 when the insured holds two or more policies issued by Travelers or its affiliates. See
23 *Valiant*, 155 Wn. App. at 474. Because, as the court has explained, it is undisputed that
24 the property damage at Gresham Station constitutes one occurrence (or "event") of
25 continuing damage, and Travelers paid the policy limit on the 2000-01 policy, no
26 subsequent policies cover the Gresham Station loss.

1 **2. The Endorsement Language is Not Ambiguous.**

2 American Guarantee argues that Travelers' policies' "first manifested property
3 damage" endorsement language is ambiguous because it is "internally inconsistent."
4 Def.'s Opp'n (Dkt. # 88) at 21. American Guarantee's example of the internal
5 inconsistency is as follows:

6 If, under the law that applies, this agreement, without this endorsement, would
7 cover any continuation, change or resumption:

- while this agreement is in effect; or
- after this agreement ends;

8 of property damage that happened before this agreement begins, which result may
9 be called a continuous or multiple trigger of coverage, the following two changes
10 apply. But these changes only apply to any such continuation, change, or
resumption of property damage which this agreement, without this endorsement,
would cover.

11 [Change No. 1:] We'll pay amounts any protected person is legally required to
12 pay as damages for . . . property damage that [] happens while this agreement is in
effect[.]

13 . . .
14 Ciechanowski Decl. (Dkt. # 80), Ex. 8. According to American Guarantee, "Clearly, the
15 endorsement becomes oxymoronic because two contradictory ideas are combined: the
16 endorsement applies if property damage first manifests before the policy period but only
17 pays if property damage first manifests during the policy period." Def.'s Opp'n (Dkt. #
88) at 21-22.

18 American Guarantee's argument is based on a misreading of the endorsement.
19 The two quoted paragraphs do not contradict each other. The first paragraph explains
20 that to whatever extent the policy (without the endorsement) would cover a continuation
21 of property damage that first manifested before the policy period, the endorsement
22 applies to expressly preclude such coverage. American Guarantee has not identified any
23 ambiguity, and thus the court will apply the "first manifested property damage"
24 endorsement as written.

1 **3. American Guarantee's Other Arguments are Irrelevant to the Issues
2 Presented in Travelers' Motion.**

3 American Guarantee's Opposition brief includes sections addressing American
4 Guarantee's own obligation to pay into the settlement fund, whether an insurer who did
5 not settle with an insured can allocate settlement proceeds post-settlement, and Travelers'
6 alleged failure to keep American Guarantee informed before settlement of the underlying
7 lawsuit. None of these issues have any bearing on Travelers' motion, which asks the
8 court to construe whether Travelers' policies cover the loss at Gresham Station. Having
9 found that none of the disputed policies do cover such loss, due to the "first
manifestation" endorsement, the court will grant Travelers' motion.

10 **D. American Guarantee's Summary Judgment Motion is Denied as Moot.**

11 American Guarantee also moved for partial summary judgment, asking the court
12 to bar Travelers "from arguing that, in settling the claims against Bayley, American
13 Guarantee paid for damages that it was not contractually obligated to pay, and therefore,
14 that American Guarantee must, to recover from [Travelers], affirmatively prove coverage
15 under each of [Travelers'] policy period worth at least \$6,000,000[.]" Def.'s Mot. (Dkt. #
16 79) at 6-7. Travelers argues in opposition that "[w]hether or not the \$4 million paid by
17 American Guarantee in the settlement of the claims against Bayley represents covered
18 property damage under the American Guarantee policies is irrelevant to the claims
19 against Travelers." Def.'s Opp'n (Dkt. # 86) at 2.

20 The court agrees with Travelers that it "is unclear what relief American Guarantee
21 is requesting from this Court." Def.'s Opp'n (Dkt. # 86) at 2. American Guarantee's
22 cross-claims against Travelers center on an analysis of *Travelers'* policies and whether
23 they cover the Bayley loss; Travelers has not argued in defense of American Guarantee's
24 cross-claims that American Guarantee paid more into the settlement fund than it was
25 contractually obligated to pay. *See* Def.'s Opp'n (Dkt. # 86) at 6. Thus, it appears that

1 American Guarantee's motion seeks to prevent Travelers from making an argument that
2 it does not attempt to make.

3 American Guarantee's Reply brief does not necessarily clear up the confusion. It
4 summarizes the relief requested:

5 In sum, when American Guarantee contributed \$ 4 million to Bayley's
6 settlement, and insisted on the specific language in paragraphs C and N, it
7 was willing to reserve Travelers' manifestation/ one-policy-limit position
8 for future resolution. But American Guarantee specifically negotiated for
Travelers' agreement that American Guarantee's contractual obligation to
pay for damages for covered property damage was at least \$3.5 million. . . .
Travelers [may] not now contradict or repudiate its agreement.

9 Def.'s Reply (Dkt. # 99) at 5. It does not appear that Travelers is attempting to contradict
10 or repudiate that agreement, so American Guarantee's motion is moot.

11 IV. CONCLUSION

12 For the reasons stated above, the Defendants' motions (Dkt. ## 77, 78) are
13 GRANTED, and Defendant's motion (Dkt. # 79) is DENIED as moot.

14 DATED this 15th day of October, 2010.

15 
16 The Honorable Richard A. Jones
17 United States District Judge